

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

ALTERNATIVE CARE SYSTEMS, INC., d/b/a)
ACCESS NURSING SERVICES,)

Plaintiff,

V.

ACCESS NURSES, INC.,

Defendant.

Civil Action No. 07 CV 10537 (CSH)

PLAINTIFF'S REPLY TO DEFENDANT'S COUNTERCLAIM

Plaintiff Alternative Care Systems, Inc., d/b/a Access Nursing Services

(“ACCESS NURSING”) replies to the Counterclaim of Defendant Access Nurses, Inc.

("ACCESS NURSES") as follows. The paragraphs of Plaintiff's Reply are numbered to correspond to the paragraphs of ACCESS NURSES' Counterclaim.

Reply to Counterclaim

1. ACCESS NURSING admits that ACCESS NURSES purports to assert a counterclaim for a declaratory judgment arising under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and 28 U.S.C. § 1338, based upon an actual justiciable controversy as to the infringement, validity, and enforceability of ACCESS NURSING's trademarks and prior use of said trademarks in the field of staffing services for travel nurses, but denies that ACCESS NURSES is entitled to the relief it seeks.

2. ACCESS NURSING admits that venue is proper in this judicial district under 28 U.S.C. §§ 1391 and 1400.

3. ACCESS NURSING admits the allegations of paragraph 3 of ACCESS NURSES' Counterclaim.

4. ACCESS NURSING admits the allegations of paragraph 4 of ACCESS NURSES' Counterclaim.

First Counterclaim
(Declaratory Relief)

5. ACCESS NURSING admits that it filed an Amended Complaint in this action on January 18, 2008, asserting rights in several trademarks and trade names. To the extent the allegations of paragraph 5 purport to restate the contents or scope of that Amended Complaint, the Amended Complaint speaks for itself. ACCESS NURSING denies any remaining allegations of paragraph 5 of ACCESS NURSES' Counterclaim.

6. Denied. ACCESS NURSING's U.S. Registration No. 2,057,656 covers its mark ACCESS NURSING SERVICES AND DESIGN.

7. ACCESS NURSING denies that it has disclaimed the words "NURSING SERVICES" as not being subject to trademark protection. ACCESS NURSING's Registration No. 2,057,656 for ACCESS NURSING SERVICES AND DESIGN speaks for itself, and ACCESS NURSING refers to and relies upon that Registration for its content. On its face, ACCESS NURSING'S Reg. No. 2,057,656 only disclaims "the exclusive right to use 'NURSING SERVICES' apart from the mark as shown." Except to that extent, Paragraph 7 of ACCESS NURSES' Counterclaim sets forth arguments of law and/or conclusions of law, and ACCESS NURSING is informed and believes that it is not required to plead in response thereto.

8. Denied.

9. ACCESS NURSING admits that staffing services for travel nurses is a highly specialized niche market but denies that that market is not in, or in the natural area of expansion of, the market in which ACCESS NURSING competes. ACCESS NURSING denies the remaining allegations of paragraph 9 of the Counterclaim.

10. ACCESS NURSING admits that, according to the United States Patent and Trademark Office's ("PTO") online database, on April 17, 2007, the PTO issued Reg. No. 3,229,311 for the mark ACCESS NURSES, and on June 26, 2007, the PTO issued Reg. No. 3,255,217 for the mark ACCESS NURSES AND DESIGN, both covering "nurse staffing services, namely, hiring, recruiting, placement, staffing and career networking services for traveling and non-traveling services" in Class 35, and that the PTO online database shows ACCESS NURSES as the owner of both those Registrations. ACCESS NURSING is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph 10, and therefore denies those allegations.

11. ACCESS NURSING is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of the first clause of the sentence that forms paragraph 11, and therefore denies those allegations. ACCESS NURSING denies the remaining allegations of paragraph 11.

12. Paragraph 12 of ACCESS NURSES' Counterclaim sets forth arguments of law and/or conclusions of law, and ACCESS NURSING is informed and believes that it is not required to plead in response thereto.

13. Paragraph 13 of ACCESS NURSES' Counterclaim sets forth arguments of law and/or conclusions of law, and ACCESS NURSING is informed and believes that it is not required to plead in response thereto.

14. ACCESS NURSING denies the allegations of paragraph 14 of ACCESS NURSES' Counterclaim.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

15. ACCESS NURSING repeats and realleges the allegations of paragraphs 1-35 of its Amended Complaint and paragraphs 1-14 of its Reply, above, to the same effect as if fully set forth herein.

16. ACCESS NURSES' Counterclaim fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

17. ACCESS NURSING repeats and realleges the allegations of paragraphs 1-35 of its Amended Complaint and paragraphs 1-16 of its Reply, above, to the same effect as if fully set forth herein.

18. ACCESS NURSES' continued use and registration of its ACCESS-formative name and marks has caused, and will continue to cause, confusion, mistake, and/or deception as to the source, origin, sponsorship, or affiliation of its goods and services, and ACCESS NURSES is therefore not entitled to the relief it seeks or any other relief that would permit it to continue to use those marks for the goods and services for which it has used and is using them.

REQUEST FOR RELIEF

WHEREFORE, ACCESS NURSING respectfully requests that this Court enter judgment in its favor against ACCESS NURSES as follows:

- (a) awarding the relief requested by ACCESS NURSING in its Amended Complaint; and
- (b) dismissing ACCESS NURSES' Counterclaim with prejudice.

Dated: February 27, 2008

Respectfully submitted,

BRYAN CAVE LLP

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